IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:24-08-2006

Coram:

The Honourable Mr. Justice Elipe DHARMA RAO
and
The Honourable Ms. Justice K. SUGUNA

W.P. No.5030 OF 1993

Bharat Heavy Electricals Ltd.
Trichy 620 014 .... Petitioner

:versus:

The ESI Corporation
rep. by its Regional Director
143 Sterling Road
Chennai .... Respondent

Petition under Art.226 of the Constitution of India, praying for a Writ of Certiorari and call for the records connected with the order No.TN/INS.II 51-4766-21 dated 8-3-1993 on the file of the respondent ESI Corporation and quash the same.

For Petitioner :: Mr. Sanjay Mohan
for M/s.Ramasubramanian Assts.
For Respondent :: Mr. G. Desappan

ORDER

Elipe DHARMA RAO, J.

On an order of reference dated 11-04-2000 passed by a learned single Judge in the above writ petition, the matter is placed before us for consideration of the following issue:

"Whether in an enquiry initiated under Sec.45-A of the Employees State Insurance Act, the contractors of the principal employer should be made as parties or not?"

2. The reference arose under the following fact situation:
Employees State Insurance Corporation (in short ESI Corporation') issued a notice dated 3-9-1992 to Bharat Heavy Electricals Limited (in short 'BHEL') pointing out that they had not till then paid the employer's as well as the employees' contribution

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as per the provisions of the Employees State Insurance Corporation Act (in short 'the Act') and that the Corporation is proposing to determine the contribution payable under Sec.45-A of the Act. The notice also afforded an opportunity to BHEL to explain their stand. The notice also made clear that in the event of any explanation not forthcoming from BHEL, then the Corporation will proceed with the case on merits and an order would be passed under Sec.45-A of the Act. The period of claim was shown to be 19-7-1981 till 30-9-1991.

2.1 BHEL, on receipt of the said notice, instead of filing their explanation had filed a petition before the authority concerned to implead the contractors named in the annexure to the affidavit filed in support of the petition stating that in their absence it will not be possible for them to submit an effective explanation. The petition for impleadment was dismissed by order dated 8-3-1993 stating that impleadment was not necessary. The order further stated that it was always open to the BHEL to bring those contractors with them to explain their stand. Assailing the said order, BHEL had filed W.P. No.5030 of 1993. The said writ petition was admitted and interim relief was also granted.

2.2 Before the learned single Judge, learned counsel for the petitioner vehemently relied upon a judgment of this Court in MADRAS GYMKHANA CLUB v. E.S.I. CORPORATION (1990-2-LLN 777) and contended that impleading of the contractors is permissible. It was also contended that the respondent authority was exercising quasi-judicial function under the Act and, therefore, the proceedings are also governed by the principles of natural justice. The enquiry to be conducted against the writ petitioner in the absence of their contractors would amount to denying them a reasonable and effective opportunity and therefore the authority went wrong in rejecting the request.

2.3 On the other hand, learned counsel appearing for the Corporation contended that there was no privity between the Corporation and the contractors and that the Act does not recognise a situation of hearing the contractors of the writ petitioners before the writ petitioner's liability was determined. Learned counsel in support of his contention, relied upon the decision in EMPLOYEES' STATE INSURANCE CORPORATION v. M/s. HARRISON MALAYALAM PVT. LTD. (AIR 1993 SC 2655).

2.4 Learned single Judge after hearing the rival contentions of the parties and on perusal of the entire material made available on record, was of the view that the question whether in an enquiry initiated under Sec.45-A of the E.S.I. Act the contractors of the principal employer should be made as parties or not appears to be covered by the judgment of this Court in Gymkhana Club Case, cited supra, in favour of the principal employer, i.e. BHEL. Learned Judge

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further observed that the judgment in Gymkhana Club Case, cited supra, was rendered solely on the basis of the judgment of the Hon'ble Supreme Court of India in FOOD CORPORATION OF INDIA v. PROVIDENT FUND COMMISSIONER AND OTHERS (1990 (1) SCC 68), which arose under Sec.7-A of the Employees' Provident Fund Act. After considering in minute details the decision in Food Corportion of India case, cited supra, the learned Judge observed that the facts in that case are totally different from the facts available in the case decided by this Court in Gymkhana Club Case and that the nature and scope of the enquiry as well as the powers of the authority conducting an enquiry under Sec.7-A of the E.P.F. Act are totally different from the nature and scope of the enquiry as well as the power available to the authority conducting enquiry under Sec.45-A of the E.S.I. Act. Learned Judge was, therefore, of the opinion that the judgment in Food Corporation of India case, cited supra, would not automatically lead a court to conclude that impleading the contractors in the enquiry under Sec.45-A of the E.S.I. Act could be ordered as a matter of routine. Learned Judge also referred to the subsequent decision of the Supreme Court in Harrison Malayalam Pvt. Ltd. case, cited supra, which arose under the provisions of E.S.I. Act, and observed that the fact situation available in the case on hand is identical to the fact situation available on the material aspects as is available in Harisson Malayalam Pvt. Ltd., cited supra. In view of the judgment of the Hon'ble Supreme Court of India in Harrison Malayalam Pvt. Ltd., the learned Judge was of the opinion that the judgment of this Court in Gymkhana Club Case, cited supra, does not appear to have decided the issue correctly and, therefore, it definitely calls for a reconsideration by a larger Bench and, accordingly passed the order of reference for referring the issue involved in this case for consideration by a larger Bench.

2.5 The matter is thus placed before us for answering the reference made by the learned single Judge.

3. In short, the reference was necessitated inasmuch as the learned single Judge, before whom the present writ petition came up for final hearing, dissented from the view taken by the learned single Judge in Gymkhana Club Case and was of the opinion that the issue is covered by the decision in Harrison Malayalam Pvt. Ltd. case. It, therefore, becomes necessary for us first to consider the decision in Gymkhana Club Case.

4. In Gymkhana Club Case, in reply to the show cause notice issued by the Corporation for determination of the petitioner-club's liability under Sec.45-A of the E.S.I. Act, the petitioner-club submitted that the liability could be determined only if the contractors concerned were impleaded and consequently filed a petition before the authority concerned seeking that four contractors may be impleaded so that the question whether they were covered by

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the provisions of the ESI Act could be decided after giving an opportunity to all the persons concerned. The respondent authority, however, rejected the said petition. To quash that order, the petitioner-club has filed the writ petition. Contending that the contractors are necessary parties and that they should be impleaded and without impleading them the issue in question cannot be determined, learned counsel for the petitioner-club cited the decision in Food Corporation of India case, cited supra, wherein, in paragraphs 8 and 9, the Supreme Court observed as follows:

> "...The Commissioner while conducting an inquiry under S.7-A has the same powers as are vested in a Court under the Code of Civil Procedure for trying a suit. The power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner ..."

In view of the decision of the Supreme Court, learned Judge was of the view that the respondent ought to have impleaded the contractors as parties as requested by the petitioner in order to adjudicate the matter in controversy and found that there was justification on the part of the petitioner-club in seeking to implead the contractors as necessary parties for adjudication of the matter in controversy. Consequently, learned Judge set aside the impugned order and directed the respondent corporation to implead the contractors as necessary parties for adjudication of the matter in controversy and to proceed further.

5. A bare reading of the judgment in Gymkhana Club Case shows that the writ petition was allowed solely relying on the above observations made by the Supreme Court in Food Corporation of India case, cited supra. The case was not considered on merits of the matter. It therefore becomes necessary for us to examine whether the law laid down in Food Corporation of India case was applicable to the fact situation available in Gymkhana Club Case.

6. The fact situation in Food Corporation of India case, cited supra, arose out of the provisions of Employees' Provident Fund Act and the power of the Commissioner under Sec.7-A of that Act. In that case, before the Commissioner, who was conducting an enquiry against the employer under Sec.7-A, a request was made by the employer to summon the contractors to produce the respective lists of workers engaged by them. The Commissioner did not summon the contractors nor the lists maintained by them and he has stated that the Corporation has failed to produce the evidence. The Commissioner proceeded to

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make an order under Sec.7-A of the said Act determining the amount payable by the Corporation. Aggrieved, the Corporation moved the High Court under Art.226. The High Court dismissed the petition. The issue that fell for consideration before the Supreme Court was whether the Commissioner who is the statutory authority has exercised powers vested in him to collect the relevant evidence before determining the amount payable under the said Act. Analysing the provisions of Sec.7-A of the said Act, the Supreme Court, in paragraph 9, observed as follows:

> "It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person." (emphasis supplied)

The Supreme Court allowed the appeal, reversed the order of the Commissioner and remitted the matter to the Commissioner to dispose of it afresh in accordance with law and in the light of the observations made. It is therefore apparent that the Supreme Court reversed the order passed by the Commissioner on the ground that the Commissioner has failed to exercise the jurisdiction particularly when the employer requested for summoning evidence from the contractors.

7. On a close scrutiny of the decisions in Food Corporation of India case and Gymkhana Club Case, we are of the view that no parallel can be drawn between the fact situation available in the said decisions. The two decisions emanate out of two entirely different enactment and the fact situations thereof were also entirely different and in complete contradistinction with each other. While in Gymkhana Club Case the subject matter of issue was rejection of the principal employer's petition for impleadment of the contractors in the proceedings initiated under Sec.45-A of the ESI Act, Food Corporation of India case dealt with the failure of the Commissioner to exercise his statutory power to issue summons to the contractors of the employer in the proceedings initiated under Sec.7-A of the EPF Act. The judgment in Gymkhana Club Case is eloquently silent on reasons as to how the Supreme Court's decision in Food Corporation of India case was applicable to the available fact

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situation more particularly so when the subject matter in issue was entirely different.

8. Be that as it may, we will also analyse the scheme and operation of ESI Act and more particularly the nature and scope of enquiry under Sec.45-A and the powers available to the authority concerned under Sec.45 thereof *vis-a-vis* the scheme and operation of EPF Act and the nature and scope of the enquiry and the powers of the authorities under Sec.7-A of the said Act to find out whether they are in pith and substance in *pari materia* and, therefore, a decision rendered in a case arising under Sec.7-A of the EPF Act could be made applicable to a case arising under Sec.45-A of the ESI Act and *vice versa.*

9. ESI Act was enacted to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. Chapter IV deals with contributions. Under Sec.39(1), the contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer and contribution payable by the employee and shall be paid to the Corporation. Sec.40(1) stipulates that principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution. Sec.41 deals with recovery of contributions from immediate employer. Sec.41(A) enables the immediate employer to maintain a register of employees employed by or through him and submit the same to the principal employer before the settlement of any amount payable under sub-section (1). Sec.44 mandates every principal employer and immediate employer have to furnish returns and maintain registers. Section 45, which is relevant for our consideration in this reference, deals with appointment of Inspectors, their functions and duties for enforcement of the provisions of the Act. Sec.45 reads under:

> "45. Inspectors, their functions and duties.- (1) The Corporation may appoint such persons as Inspectors, as it thinks fit, for the purposes of this Act, within such local limits as it may assign to them.
>
> (2) Any Inspector appointed by the Corporation under sub-section (1) (hereinafter referred to as Inspector), or other official of the Corporation authorised in this behalf by it, may, for the purpose of enquiring into the correctness of any of the particulars stated in any return referred to in section 44 or for the purpose of ascertaining whether any of the provisions of this Act has been complied with-

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(a) require any principal or immediate employer to furnish to him such information as he may consider necessary for the purposes of this Act; or

(b) at any reasonable time enter any office, establishment, factory or other premises occupied by such principal or immediate employer and require any person found in charge thereof to produce to such Inspector or other official and allow him to examine such accounts, books and other documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary; or

(c) examine with respect to any matter relevant to the purposes aforesaid, the principal or immediate employer, his agent or servant, or any person found in such factory, establishment, office or other official has reasonable cause to believe whom the said Inspector or other official has reasonable cause to believe to be or to have been an employee;

(d) make copies of, or take extracts from any register, account book or other document maintained in such factory, establishment, office or other premises;

(e) exercise such other powers as may be prescribed.

(3) An Inspector shall exercise such functions and perform such duties as may be authorised by the Corporation or as may be specified in the regulations."

Sec.45-A which deals with determination of contributions in certain cases reads as under:

"45-A Determination of contribution in certain cases.- (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Inspector or other official of the Corporation referred to in sub-section (2) of section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contribution payable in respect of the employees of that factory or establishment:

Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the

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Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45-B or the recovery under section 45-C to 45-I."

A careful conjoint reading of the provisions of Secs.40, 41 and 45-A of the ESI Act clearly shows that the liability to pay the contribution, both employer's contribution and the employee's contribution, in respect of every employee, whether directly employed by him or by or through an immediate employer, is primarily that of the principal employer and if for any reason the immediate employer fails to remit the contribution and the principal employer has paid contribution in respect of an employee employed by or through an immediate employer, the principal employer is entitled to recover the amount of the contribution so paid from the immediate employer either by deduction from any amount payable to him by the principal employer under any contract or as a debt payable by the immediate employer. Therefore, the liability of the principal employer to pay the contribution under the Act is primary and absolute and independent that of the liability of the immediate employer and irrespective of the fact whether the immediate employer has paid the contribution or not. Further, under Sec.45-A, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment on the basis of information available to it in a case where no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Sec.44 or any Inspector or other official of the Corporation referred to in subsection (2) of Sec.45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under Sec.45. The proviso to Sec.45-A makes it clear that no such order shall be passed unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard. Therefore, when the provisions of the Act in positive expressions prescribe that the liability of the principal employer to pay the contributions is primary and absolute, we are of the view that in an enquiry under Sec.45-A of the ESI Act against the principal employer, the question of impleadment of immediate employer or contractor does not arise. All that is required before passing an order Sec.45-A of the Act is that the principal employer must be given a reasonable opportunity of being heard. Therefore, the only ground on which the principal employer could assail the order passed under Sec.45-A is that no reasonable opportunity of being heard was given to them or in the other words, the order was passed in breach of principles of natural justice.

10. EPF Act was enacted to provide for the institution of provident funds, pension fund and deposit-linked insurance fund for employes in factories and other establishment. The term "employee"

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for the purpose of the said also includes any person employed by or through a contractor (immediate employer) in or in connection with the work of the establishment (principal employer). Sec.7-A deals with the determination of moneys due from the employers and the powers of the officer conducting the enquiry thereunder. Sec.7-A reads as follows:

> "7-A. Determination of moneys due from employers.- (1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order-
>
> (a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and
>
> (b) determine the amount due from any employer under any provision of this Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be,
>
> and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.
>
> (2) The officer conducting the inquiry under sub-section (1) shall, for the purpose of such inquiry have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908) for trying a suit in respect of the following matters, namely:-
>
> (a) enforcing the attendance of any person or examining him on oath;
>
> (b) requiring the discovery and production of documents;
>
> (c) receiving evidence on affidavit;
>
> (d) issuing commissions for the examination of witnesses,
>
> and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code (45 of 1960).
>
> (3) No order shall be made under sub-section (1) unless the employer concerned is given a reasonable opportunity of representing his case.
>
> ... ... "

An inquiry under sub-section (1) of Sec.7-A can be initiated to decide the dispute regarding the applicability of the Act to an establishment and to determine the amount due from any employer under any provisions of the Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be. For the purposes of such inquiry, the authorities under the Act are vested with the same powers as are vested in a civil court for trying a suit though such

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powers are restricted to certain specified matters, viz. to enforce the attendance of any person or examining him on oath, requiring the discovery and production of documents, receiving evidence on affidavit, issuing commission for the examination of witnesses. A fiction is created under Sec.7-A that an inquiry thereunder is deemed to be a judicial proceeding. The observance of principles of natural justice is also mandated vide sub-section (3) which says that no order under sub-section (1) shall be made unless the employer concerned is given a reasonable opportunity of representing his case. Thus it is obvious that such specific powers are given to the authorities concerned to decide not abstract questions of law, but to determine actual concrete differences in payment of contribution and other dues by identifying the workmen and the authorities should exercise all their powers to collect all evidence and collate all material before coming to proper conclusion and as such an inquiry under Sec.7-A is more or the less a trial of a suit before a civil court and judicial in nature. The powers so conferred on the authorities concerned are being statutory powers, a legal duty is cast on such authorities to exercise the same when situation arises and failure to exercise the jurisdiction, especially when a party to the proceedings requests for such exercise, would lead to nullification of the order passed in the inquiry.

11. Thus it could be seen that the powers given to the officer conducting an inquiry under Sec.7-A are not made available to the authority conducting an enquiry under Sec.45-A of the ESI Act. Such powers are explicitly absent in Sec.45-A of the ESI Act. The nature of proceedings in an enquiry under Sec.45-A of the ESI Act is entirely different from the nature of proceedings of an inquiry under Sec.7-A of the EPF Act. Even in the matter of observance of principles of natural justice by the authority concerned, while sub-section (3) of Sec.7-A says that no order shall be made under sub-section (1) unless the employer concerned is given a reasonable opportunity of representing his case, proviso to sub-section (1) of Sec.45-A says that no such order shall be passed by the Corporation unless the principal or immediate employer has been given a reasonable opportunity of being heard. In our opinion the phraseology "reasonable opportunity of representing his case" employed in Sec.7-A of EPF Act is wider in amplitude and having wider ramifications vis-a-vis "reasonable opportunity of being heard" occurring in Sec.45-A of the ESI Act. The cumulative effect of the comparison leads us to irresistible conclusion that while the proceedings under Sec.7-A of the EPF Act are judicial and elaborate in nature like a civil suit, the proceedings under Sec.45-A of the ESI Act are quasi-judicial and summary in nature.

12. Even at the cost of repetition, we would point out that in Food Corporation of India, cited supra, the Supreme Court reversed the order of the Commissioner and that of the High Court on the

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ground that the Commissioner has failed to exercise powers vested in him under sub-section (2) of Sec.7-A to collect the relevant evidence particularly when the employer requested for summoning evidence from the contractors. On the contrary, in Gymkhana Club Case the principal employer sought for impleadment of contractors as necessary parties for adjudication of matter in controversy. Thus, on a careful comparative analysis of the said two decisions from the point of view of the fact situation available as well as the nature of the proceedings, we are of the considered view that the powers and functions of the authority conducting an enquiry under Sec.45-A of the ESI Act is altogether different and distinct from the powers and functions of the authority conducting an inquiry under Sec.7-A of the EPF Act. So also the nature of the proceedings. That being the position, a decision rendered in a case arising under Sec.7-A of the EPF Act could not be automatically made applicable to a case arising under Sec.45-A of the ESI Act and *vice versa*.

13. For the reasons stated above, we are of the view that the decision in Food Corporation of India case, cited supra, has no relevance at all to the fact situation available in the Gymkhana Club Case, cited supra, and as such the judgment of this Court in Gymkhana Club Case did not decide the issue correctly.

14. This takes us to the consideration of the issue raised by the learned single Judge in the order of reference, which we have extracted in the opening paragraph of this judgment.

15. Facts need not be repeated once over, suffice it to state when the petitioner was served with a show cause notice dated 3-9-1992 by the Regional Director of ESI Corporation pointing out that they have not paid the contributions due on the wages paid through immediate employer (contractors) for the period 19-7-1981 to 30-9-1991 amounting to Rs.3,32,45,042.95, the petitioner filed a petition before the authority concerned to implead certain third parties/contractors as proposed parties to the proceedings as, according to the petitioner, unless notice is issued to the said third parties/contractors, it will not be possible for them to meet the show cause notice effectively. The petitioner was dismissed by the authority concerned by order dated 8-3-1993 stating that engagement of third parties/contractors for the petitioner was an internal affair of the factory and that the petitioner was not prevented in any manner from bringing along with them those contractors to explain the nature of expenditure incurred by them through the contractors. The order further stated that the petitioner may recover the contributions from the immediate employer even as deduction from any amount payable by them under any contract or even as a debt payable by the contractors and, therefore, it was not necessary for the Corporation to implead the contractors to enable the principal employer to invoke their right of recovery. The

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order requested the petitioner to attend the personal hearing along with the records on 18-3-1993 and if they fail to appear the case would be decided ex parte on the basis of the available records. It is this order which the petitioner has challenged in this writ petition.

16. Learned counsel for the petitioner, placing strong reliance on the judgment of this Court in Madras Gymkhana Club case, cited supra, argued that impleadment of the third parties/contractors is permissible under the Act. Learned counsel contended that by rejection of the request to implead the contractors, the petitioner is deprived of a reasonable and effective opportunity and, therefore, it is against the principles of natural justice. Though learned counsel conceded that the Corporation need not look beyond the petitioner for recovering the contributions, but that situation would arise only at the time of recovery of the contribution and not at the stage of determination. Learned counsel further stated that by impleadment of the contractors no prejudice would be caused to the Corporation or any one.

17. Learned counsel for the petitioner also relied on the decision of the Supreme Court in Food Corporation of India, cited supra, Ashok Leyland Limited v. ESI Corporation (1996 FJR 461) and Chennai Petroleum Corporation Ltd. v. Assistant Provident Fund Commissioner, Chennai (2006 (1) LLN 948).

18. Per contra, learned counsel appearing for the Corporation vehemently argued that under the scheme of the ESI Act, the liability of the principal employer to pay the contribution is primary and that the Corporation has a right to look only the principal employer for determination and recovery and not anybody else beyond him. Learned counsel further submitted that there is no privity of connection in the enquiry under Sec.45-A of th ESI Act and the request made by the petitioner is opposed to law. Learned counsel relied on the decision of the Supreme Court in ESI Corporation v. Harrison Malayalam Pvt. Ltd. (AIR 1993 SC 2655) and ESI Corporation, Bangalore v. Dharwad Co-op. Milk Producers Societies Union Ltd., Dharwad (2000 [1] LLJ 355).

19. We have heard the learned counsel for the parties and perused the entire material placed on record. The period for which the contributions are due is not disputed by the petitioner. It is also not disputed by the petitioner that the employees in regard to whom the claim was made were contract employees or third parties employees who were engaged for carrying out some work for them. According to the petitioner since these employees concerned were not their direct employees, no records were available with them and that all the details relating to their employment and payment and number of persons employed, etc. are only with the contractors/third

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parties. On this ground, the petitioner sought for impleadment of the contractors.

20. It is seen from the provisions of Sec.41 that every principal and immediate employer is enjoined to maintain such registers or records in respect of his factory or establishment and shall also submit to the Corporation such returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer. When once the petitioner themselves admit that they engaged employees through contractors/third parties, under Sec.41, they are also bound to maintain registers and records relating to the engagement of such contract employees or at least, when their factory is covered by the provisions of the ESI Act, should have collected all such details from the immediate employer especially when under Sec.40 the primary responsibility of payment of the contribution in respect of every employee, whether directly employed by him or by or through an immediate employer, is on the principal employer, in this case the petitioner. It is not as if the engagement of employees through contractors/third parties was not within the knowledge of the petitioner and if they failed to collect, maintain and furnish the necessary details before the authority concerned, they have to blame themselves for their default. Sec.45-A also makes it clear that where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44, the Corporation may, on the basis of the information available to it, could determine the amount of contributions payable in respect of the employees (including contract employees) of that factory or establishment. The scheme of the ESI Act does not envisage separate and independent determination of contribution payable by the principal employer and the immediate employer in respect of employees directly employed by the principal employer and the contract employees respectively. When once the authority is satisfied that persons were employed by or through an immediate on the premises of the factory or establishment or under the supervision of the principal employer and if for any reason the principal employer fails to submit, furnish or maintain the records and registers in accordance with the provisions of Sec.44, the Corporation is within their powers to determine the contribution payable in respect of contract employees against the principal employer without looking for the immediate employer. As already stated, in an enquiry under Sec.45-A of the ESI Act all that is required is the authority must give a reasonable opportunity of being heard to the employer concerned. That has been complied with by the respondent in the present case by issuing the show cause notice dated 3-9-1991, wherein the Corporation has also afforded a personal hearing to the petitioner. The decisions relied on by the petitioner, viz. Food Corporation of India, Ashok Leyland Limited and Chennai

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Petroleum Corporation Ltd., cited supra, are of no assistance to them.

21. In this context, it is pertinent to note the observations of the Supreme Court in Harrison Malayalam Pvt. Ltd. case, cited supra, on which heavy reliance was placed by the learned counsel for the Corporation, which reads as under:

> "Under the Act it was the duty of the respondent-company to get the necessary details of the workmen employed by the contractor at the commencement of the contract since the primary responsibility of payment of the contribution is on the principal employer. On the admitted fact that the respondent-company had engaged the contractor to execute the work, it was also the duty of the respondent-company to get the temporary identity certificates issued to the workmen as per the provisions of Regulations 12, 14 and 15 of the Employees' State Insurance (General) Regulations, 1950 and to pay the contribution as required by Section 40 of the Act. Since the respondent-company failed in its obligation, it cannot be heard to say that the workers are unidentifiable. It was within the exclusive knowledge of the respondent-company as to how many workers were employed by the contractor. If the respondent-company failed to get the details of the workmen employed by the contractor, it has only itself to thank for its default. Since the workmen in fact were engaged by the contractor to execute the work in question and the respondent-company had failed to pay the contribution, the appellant-corporation was entitled to demand the contribution although both the contribution period and the corresponding benefit period had expired." (emphasis supplied)

It is also to be noted that the fact situation available in the present writ petition is similar to the fact situation available on material aspect in the above said decision.

22. We may also refer to the judgment of the Karnataka High Court in Dharwad Co-op. Milk Producers Societies Union Case, cited supra. There also the facts were identical and the respondent-employer pressed into service the decision of this Court in Madras Gymkhana Club Case, cited supra., in support of their contention of impleadment of contractors as party to the proceedings under Sec.45-A of the Act. The learned Judge, however, quoted the said decision with disapproval.

23. For the reasons stated above, we hold that in an enquiry initiated under Sec.45-A of the ESI Act, the contractors of the principal employer need not be made as parties and answer the

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reference accordingly. As a necessary corollary, the writ petition is liable to be dismissed and, accordingly, it is dismissed. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

Jai

To:

The Regional Director
ESI Corporation
143 Sterling Road
Chennai

+ 1 CC To M/s.S.Ramasubramaniam, Advocate SR NO.38210

+ 1 CC To Mr.G.Desappan, Advocate SR NO.38516

W.P. No.5030 of 1993

RA(CO)
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